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No. 00-1284

In the Supreme Court of the United States

LAMONT D. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an untimely petition for rehearing in the court of appeals that is denied by that court without comment restarts the period for filing a petition for a writ of certiorari.

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OPINIONS BELOW

The order of the court of appeals dismissing the case (Pet. App. 1a-2a) is unreported. The two orders of the court of appeals denying petitioner's motions for rehearing (Pet. App. 36a-37a) are unreported.[1] The district court's judgment of foreclosure (Pet. App. 20a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-4a) was entered on June 21, 2000. Petitioner filed

[1] The first order denying rehearing, entered on September 8, 2000, is not included in the petitioner's appendix, but was included in a supplemental filing with the Court.

untimely motions for reconsideration in the court of appeals on August, 30, 2000, and September 15, 2000. Those motions were denied on September 8, 2000 and September 26, 2000, respectively. The petition for a writ of certiorari was filed on November 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Rule 40 of the Federal Rules of Appellate Procedure provides that:

> in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

Rule 13.1 of the Rules of the Supreme Court provides that "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by * * * a United States court of appeals * * * is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." Rule 13.3 provides that:

> The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate * * *. But, if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties * * * runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

2. Petitioner Lamont D. Hill borrowed $520,000 from the United States and secured this borrowing with two mortgages delivered to the United States Department of Agriculture, Farm Services Agency. Pet. App. 32a. Petitioner defaulted on these loans, and, on November 25, 1998, the United States filed a complaint seeking foreclosure on the mortgaged property.

On April 5, 2000, the district court issued an order granting the United States' motion for summary judgment. The district court ordered that a "[j]udgment of foreclosure is entered against" the mortgaged property. Pet. App. 33a. The court also ordered the United States, if it was "not willing * * * to bid the full amount of the judgment debt," to "establish by competent proof to the satisfaction of the Court, the fair and reasonable value of the mortgaged premises," and "retain[ed] jurisdiction to enter a further Order determining the fair and reasonable value." 98–3024 Order 8 (Apr. 5, 2000).[2] Pursuant to that order, the United States began the process of obtaining an appraisal of the mortgaged property. See, *e.g.*, Pet. App. 45a, Docket Entry (DE) 79.

Petitioner then filed a "Motion to Open Judgment and Amend the Findings of Fact and Conclusions of Law [under] Rule 59(a)." See Pet. App. 45a, DE 82. On May 2, 2000, before the district court had ruled on that motion, petitioner filed a notice of appeal. Pet. App. 45a, DE 86. On May 18, 2000, the district court rejected the motion for reconsideration and, with regard to the notice of appeal, explained that

> [n]o final judgment of foreclosure has yet been entered and the United States Court of Appeals will

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[2] This portion of the district court's order is not included in petitioner's appendix.

> not consider the appeal until a final judgment has been entered. Pursuant to Rule 4(a)(2) of the Federal Rules of Appellate Procedure, the notice of appeal will be treated as filed ~~when~~ a final judgment is entered.

Pet. App. 27a. The district court ordered the United States to "promptly submit [an] * * * appraisal" of the mortgaged property. *Id.* at 28a. On June 1, 2000, the United States submitted the appraisal.

3. On June 5, 2000, petitioner's appeal to the Eighth Circuit was docketed. The United States moved to dismiss the appeal on the basis that "there has been no final order entered from which the Appellant/Defendant may appeal." U.S. Mot. to Dismiss Appeal 1. The United States explained that the order was not final because the "Court has not determined the value of the real property being foreclosed upon." *Id.* at 2.

On June 16, 2000, the district court entered a "Judgment of Foreclosure and Decree of Sale." Pet. App. 21a; *id.* at 45a, DE 92. The court accepted the government's recently obtained appraisal as the fair market value of the property. Pet. App. 21a. Based on the valuation, the district court ordered that it was "now appropriate to enter a final amended judgment of foreclosure and decree of sale." *Ibid.* The district court entered an "Amended Judgment of Foreclosure and Decree of Sale" four days later, on June 20, 2000. *Id.* at 15a; *id.* at 45a, DE 94.[3]

On June 21, 2000—the day after the district court issued its amended judgment—the court of appeals

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[3] The amended judgment corrected the period for which interest was calculated. Compare Pet. App. 16a (interest calculated "to the date of filing of this amended judgment"), with *id.* at 22a (interest calculated "to the date [of] sale").

granted the government's motion to dismiss petitioner's appeal. Pet. App. 4a. The court of appeals explained that "dismissal of this appeal is granted on the ground there is not yet a final judgment and the appeal is premature." *Ibid.* In its cover letter to petitioner, the court of appeals explained:

> Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing *must* be received by the clerk's office within the time set by [Federal Rule of Appellate Procedure] 40 in cases where the United States or an officer or agency thereof is a party (within 45 days of entry of judgment). Petitions for rehearing are not afforded a grace period for mailing and are subject to being denied if not timely received.

Id. at 5a.

4. On July 6, 2000, petitioner filed a "Motion for Relief from Order" in the district court under "Rule 60(b)(5) & (6)." Pet. App. 45a, DE 96. In that motion, petitioner acknowledged that the earlier-filed "Notice of Appeal now with the Court has no basis" and contended that the district court erred in concluding that the May 2, 2000 notice of appeal was perfected by the final judgment of foreclosure. Br. in Support of R. 60(b)(5) and (6) Mot. 2. Petitioner also argued that the district court should order that the date for filing a notice of appeal began to run on June 20, 2000, the date of the "Amended Judgment of Foreclosure and Decree of Sale," rather than on June 16, 2000, the date that the court entered the "Judgment of Foreclosure and Decree of Sale." *Id.* at 1-2. On July 14, 2000, the district

court denied this motion, calling it "frivolous." Pet. App. 8a. Referring to the May 2, 2000 notice of appeal dismissed by the court of appeals on June 21, 2000, the district court added that petitioner "has already filed a notice of appeal and his appeal is perfected as of the entry of a final judgment in this action." *Ibid.* The district court ordered that the "filing of any additional frivolous motions in this action by Hill will result in the imposition of monetary and possibly other sanctions." *Ibid.*

5. The time for petitioner to seek rehearing of the court of appeals' June 21, 2000 order dismissing the appeal noticed on May 2, 2000 passed on August 7, 2000. On August 8, 2000, petitioner filed a petition with the court of appeals seeking a stay of any sale of the property. On that same day, the clerk of the court returned the motion for a stay to him, advising him that

> there has not been a notice of appeal filed in the district court concerning this matter. After you have filed a notice of appeal in district court, you may wish to renew the motion for a stay * * *.

Pet. App. 42a. On August 21, 2000, the time to file a notice of appeal from the District Court's June 20, 2000 order passed.

Although these dates had passed, on August 30, 2000, petitioner filed a "Motion for Reconsideration or Rehearing" in the court of appeals. That motion was denied on September 8, 2000 in an order that stated: "Appellant's motion for reconsideration has been considered by the Court and is denied." 00-2363 Order (Sept. 8, 2000). Petitioner filed a second reconsideration motion on September 15, 2000, which the court of appeals denied on September 26, 2000. See Pet. App.

36a ("Appellant's successive motion for reconsideration has been considered by the Court and is denied.").

On November 13, 2000, petitioner filed his petition for a writ of certiorari.

ARGUMENT

This Court lacks jurisdiction to review the court of appeals' June 21, 2000 order dismissing petitioner's appeal because his petition for certiorari is untimely. By failing either to file a petition for certiorari within 90 days of the court of appeals' order dismissing his appeal or to seek a timely rehearing of that order, petitioner lost his opportunity to seek review of that order.

Petitioner's failure to seek timely review of the court of appeals' dismissal is a sufficient basis to dispose of his petition. The case would not merit review, however, even if the petition were timely, because the court of appeals' dismissal was based on case-specific and fact-bound procedural defects, and because the ruling below was correct in any event. The court of appeals dismissed petitioner's appeal because there was no final judgment in the district court when the appeal was taken. Petitioner failed to file a new notice of appeal, timely or otherwise, after the district court entered its June 20, 2000 final order of foreclosure. In short, no question of importance is presented by the petition.

1. Because petitioner failed to seek certiorari within 90 days or file a timely rehearing petition in the court of appeals, this Court lacks jurisdiction to review the court of appeals' June 21, 2000 dismissal order. A petition for certiorari must be filed within ninety days of the court of appeals' entry of judgment. Sup. Ct. R. 13.1; see 28 U.S.C. 2101(c). "[I]f a petition for rehearing is *timely* filed in the lower court," however, the time to file "runs from the date of the denial of the petition

for rehearing." Sup. Ct. R. 13.3 (emphasis added). This Court has recognized that in civil cases (in which the 90-day limit is prescribed by statute), "[t]his 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990).

Here, well over ninety days passed between the date of the court of appeals' original dismissal order (June 21, 2000) and the date petitioner filed his petition for a writ of certiorari (Nov. 13, 2000).[4] Additionally, petitioner did not "timely file[]" (Sup. Ct. R. 13.3) a petition for rehearing in the court of appeals. Accordingly, the petition for a writ of certiorari filed here is jurisdictionally out of time and should not be considered. Sup. Ct. R. 13.3; see *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 210 (1952).

That the court of appeals later denied petitioner's untimely reconsideration requests without comment does not change this result. See 00-2363 Order (Sept. 8, 2000) ("[a]ppellant's motion for reconsideration has been considered by the Court and is denied"); Pet. App. 36a ("[a]ppellant's successive motion for reconsideration has been considered by the Court and is denied"). To be sure, this Court has "held that when a court considers on its merits an untimely petition for a rehearing * * * the time for appeal may begin to run anew from the date on which the court disposed of the untimely application." *Minneapolis-Honeywell*, 344 U.S. at 210.

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[4] Petitioner appears to rely on the date of the mandate issued by the court of appeals to show that his petition is timely. See Pet. 1. This Court's rules expressly provide, however, that the "time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate." Sup. Ct. R. 13.3.

However, there is nothing in the court of appeals' denials here to suggest that it "consider[ed] [petitioner's motions] on [their] merits." *Ibid.* See also *id.* at 211 ("the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought"). Petitioner never filed a motion to extend the period for filing a rehearing petition. Additionally, the record and the appellate rules indicate that the court of appeals would not have considered petitioner's untimely rehearing petition "on its merits" without an order that expressly extended the period for filing. See Fed. R. App. P. 40(a) (the "time within which any party may seek rehearing is 45 days after entry of judgment, *unless an order shortens or extends the time*") (emphasis added); see also Pet. App. 5a (rehearing petitions "are subject to being denied if not timely received").[5]

Petitioner failed to meet this deadline in spite of being specifically instructed as to its importance. When the court of appeals dismissed his appeal, it notified him "that petitions for rehearing *must* be received by the

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[5] In *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144 (1942), this Court explained that:

> where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts—if any are offered—support, grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.

Id. at 150.

clerk's office within the time set by [Federal Rule of Appellate Procedure] 40 in cases where the United States or an officer or agency thereof is a party (within 45 days of entry of judgment)." Pet. App. 5a (emphasis in original). It further warned him that a late-filed petition was "subject to being denied if not timely received." *Ibid.* In spite of this warning, petitioner failed to file a timely petition for rehearing. Accordingly, this Court lacks jurisdiction to review the court of appeals' dismissal order.

2. a. Moreover, the court of appeals' dismissal of petitioner's prematurely filed appeal was correct, because there was no final judgment in the district court when the notice of appeal was filed. To be sure, the district court may have contributed to petitioner's procedural confusion by twice suggesting that petitioner did not need to file a new notice of appeal and could instead rely on the notice of appeal dismissed by the court of appeals on June 21, 2000. This suggestion may have contributed to petitioner's failure to obtain review of the foreclosure decision.[6] However, petitioner should have relied on the clear directions of the court of appeals to the effect that he needed to refile his notice of appeal to protect his appellate rights. See Pet. App. 42a.[7] Despite this clear direction, petitioner did

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[6] The district court stated in its May 15, 2000 order denying petitioner's motion to open the judgment that pursuant to Rule 4(a)(2), the notice of appeal would "be treated as filed when a final judgment is entered." Pet. App. 27a. Similarly, in its July 14, 2000 order denying petitioner's motion for relief from order, the district court noted that petitioner's "appeal is perfected as of the entry of a final judgment in this action." *Id.* at 8a.

[7] The government's appellate brief also put petitioner on notice of the procedural deficiencies of his appeal. The government, in its submission to the court of appeals, suggested that there was no

not attempt to resolve the question of the continuing viability of his notice of appeal – he neither sought timely rehearing of the court of appeals' order dismissing the appeal nor filed a new notice of appeal from the district court's final judgment entered on June 20, 2000.[8]

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effective notice of appeal as to the order entering final judgment. See Response of the U.S. to Appellant's Mot. for an Order Granting a Temporary Stay 1 (received by the court of appeals on Aug. 7, 2000) ("As far as the United States is aware, there is no pending appeal with this court.").

[8] Neither the premature appeal nor the premature Rule 59 motion affected the validity of the district court's June 20, 2000 final judgment. Although as a general rule the filing of a notice of appeal divests the district court of jurisdiction, an attempted notice of appeal from a nonfinal judgment will not divest the district court of jurisdiction, and thus the district court retained jurisdiction to enter the final judgment. See *SEC* v. *American Bd. of Trade, Inc.*, 829 F.2d 341 (2d Cir. 1987), cert. denied, 486 U.S. 1034 (1988); *Doucet* v. *Gulf Oil Corp.*, 783 F.2d 518, 526 (5th Cir.), cert. denied, 479 U.S. 883 (1986).

Additionally, petitioner interposed his "Motion to Open Judgment and Amend Findings of Fact and Conclusions of Law [under Federal Rule of Civil Procedure] 59(a)" between the order he attempted to appeal and his notice of appeal. See Pet. App. 45a, DE 82. Federal Rule of Appellate Procedure 4(a)(4) provides that when a party files a timely motion for a new trial under Rule 59(a), the "time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Fed. R. App. P. 4(a)(4). The district court, after first declaring the motion mooted by the notice of appeal, Pet. App. 27a, later determined that the notice of appeal did not moot the motion, considered the motion on the merits, and rejected it, stating that "this matter should proceed to judgment and the Hill motion should be denied," *id.* at 28a. The court denied this motion before it entered final judgment, and thus the motion had no effect on the final judgment subsequently entered or the deadline for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4).

Indeed, this is not a situation where later actions could save a premature notice of appeal. Here, the prematurity of petitioner's notice of appeal was fatal. Federal Rule of Appellate Procedure 4(a)(2) provides that "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." However, this Court has clarified that a prematurely filed notice of appeal ripens "only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991).

Here, the grant of summary judgment issued by the district court on April 5, 2000 would not have been appealable even if accompanied by the entry of judgment. The fair market valuation of the property, which is a necessary step before the entry of judgment, had yet to be determined. Cf. *United States* v. *Fitzgerald*, 109 F.3d 1339, 1342 (8th Cir. 1997) (foreclosure order is immediately appealable when "the value * * * of [debtor's] interest was * * * fully resolved" by the district court). Accordingly, the district court ordered that the government "shall establish by competent proof to the satisfaction of the Court, the fair and reasonable value of the mortgaged premises at this time and the Court retains jurisdiction to enter a further Order determining the fair and reasonable value." 98-3024 Order 8 (Apr. 5, 2000); see U.S. Mot. to Dismiss 1-2 ("there has been no final order entered" because the "Court ha[d] not determined the value of the real property being foreclosed"). Because the fair market value had not been determined, the April 5, 2000 ruling did not "announce a decision purporting to dispose of all

of [the government's] claims." *FirsTier*, 498 U.S. at 277.[9]

b. In sum, even if this Court had jurisdiction to grant review, the procedural issues in this case would present no issue worthy of consideration on the merits. This case is a procedural muddle. The district court, apparently aware of the petitioner's litigation history, may have contributed to the muddle. However, this is a unique situation that is unlikely to recur. The issues petitioner seeks to present involve only factbound and case-specific applications of clearly established procedural rules. Accordingly, those issues would not warrant this Court's review.

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[9] Moreover, petitioner could not have "reasonably but mistakenly believe[d] [the decision] to be a final judgment" (*FirsTier*, 498 U.S. at 276), because the district court specified in its May 15, 2000 order denying petitioner's motion to open the judgment that "[n]o final judgment of foreclosure has yet been entered and the United States Court of Appeals will not consider the appeal until a final judgment has been entered." Pet. App. 27a. Additionally, because the dismissal was correct, it would have been inappropriate for the government to "alert the Circuit Court * * * that [its] Motion [for dismissal of petitioner's earlier appeal] had no merit and had been 'mooted.'" Pet. 11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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